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IN THE

Supreme Court of the United States

October Term 1991

JOHN K. YEE, *et al.*,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

On Writ of Certiorari To The Fourth Appellate District, Division One, Court of Appeal For the State of California

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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No. 90-1947

JOHN K. YEE, *et al.*, *Petitioners*,

v.

THE CITY OF ESCONDIDO, *Respondent*.

ON WRIT OF CERTIORARI TO THE
FOURTH APPELLATE DISTRICT,
DIVISION ONE, COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with

over 120,000 members and supporters nationwide. While WLF engages in litigation and administrative process in a variety of substantive areas of the law, WLF devotes considerable resources to cases dealing with property rights in general and the Takings Clause of the Fifth Amendment in particular. WLF has filed briefs on these issues in this Court and lower courts, including cases on rent control. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

The Allied Educational Foundation (AEF) is a non-profit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including and law and economics, and has appeared before this Court as amicus on a number of occasions.

Both WLF and AEF believe that they can provide a broader perspective to this case and the issues presented which will assist the Court in adjudicating the merits of this case. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this Brief.

STATEMENT OF THE CASE

On July 7, 1988, a mobilehome rent control ordinance became effective within the City of Escondido for all mobilehome parks. The Ordinance provides, inter alia:

> Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. . . . No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board [the Mobilehome Park Rental Review Board of the City of Escondido].

Escondido Municipal Code, Article V, § 29-103. There is no provision in the Ordinance for adjustment of the rental to fair market value when a tenant vacates the leased property. (*See* Respondent's Brief in Opposition to Certiorari, Appendix A-1 - A-3). The absence of "vacancy decontrol" means that the existing rental obligation carries over to the new tenant.[1]

The operation of the Escondido Ordinance must be viewed in connection with the California Mobilehome Residency Law (Calif. Civ. Code §§ 798 et seq.). The state law severely limits the grounds upon which a mobilehome tenancy may be terminated or not renewed. Calif. Civ. Code §§ 798.55 & 798.56. As a consequence, tenancies on a month to month basis or for a specified term are, in effect, abolished for mobilehome parks. Of course, the tenancy may be terminated by the voluntary decision of the tenant. Calif. Civ. Code § 798.59.

The Escondido Ordinance operates in combination with the California Mobilehome Residency Law to guarantee tenants a continuing lease at a controlled rent for the duration of the tenancy. Because there is no provision for any rental adjustment when a tenancy is terminated, a selling tenant may charge a premium on the sale of a mobilehome coach in relation to the extent that the controlled rent is lower than the fair market rental value of the mobilehome park space.

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1 *See* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 412, 448-49 (1988).

Petitioners John K. Yee and Irene S. Yee, owners of two mobilehome parks in the City of Escondido, filed an action under 42 U.S.C. §§ 1983 et seq., alleging that the mobilehome rent control ordinance enacted by the Respondent City of Escondido constituted a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution, as well as under the California Constitution, Article 1, Section 19. They sought declaratory and injunctive relief against further enforcement of the ordinance, and attorneys' fees under 42 U.S.C. § 1988 and Cal. Civ. Proc. § 1036.

The Respondent filed a demurrer and a motion to strike. The demurrer was sustained by the Superior Court for the County of San Diego without leave to amend and action was dismissed by the Court. The Yees appealed this decision to the California Court of Appeal, Fourth Appellate District. Pursuant to stipulation of the parties, the Yees' appeal was consolidated on appeal with other cases challenging the Escondido Ordinance. (*See* Respondent's Brief in Opposition to Certiorari, pp. 7-8, n. 6). The Court of Appeal affirmed the Superior Court decision. The California Supreme Court denied a Petition for Review.

On October 15, 1991, this Court granted certiorari with respect to Questions 1 and 2 raised in Petitioner's Petition for Certiorari. ___ U.S. ___, 112 S.Ct. 294 (1991).

This *Amici Curiae* Brief will address the following two questions:

1. Does the Escondido Ordinance constitute a taking under the Fifth and Fourteenth Amendments by permanently authorizing the occupation of property and thereby causing the transfer of an interest in property from the owner to a third party, without payment of just compensation?

2. Does the Escondido Ordinance "substantially advance legitimate state interests" or does it "den[y] an owner economically viable use of his land"?[2]

SUMMARY OF ARGUMENT

When government authorizes the permanent physical occupation of property, this Court has readily found a taking, "without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). The Escondido Ordinance, operating in combination with the California Mobilehome Residency Law (Calif. Civ. Code §§ 798 et seq.), authorizes the taking of economic benefits from the park owner by a tenant who is entitled to occupy the property in perpetuity.

Under the California Mobilehome Residency Law, the park owner may not terminate a lease or refuse to renew same so long as the tenant pays the rent and reasonable expenses and avoids bad behavior. Calif. Civ. Code §§ 798.55 & 798.56. When the tenant decides to sell the mobilehome coach, the park owner may not require the removal of the coach from the park except under very limited circumstances. Calif. Civ. Code § 798.73. The park owner may not ordinarily refuse approval of the new purchaser as a tenant. Calif. Civ. Code § 798.74. The practical effect of these provisions is to allow the present tenant to transfer the possessory interest in the mobilehome space to a third party without renegotiation of the terms and conditions of the lease.

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[2] *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). *Amici* have made the assumption that this is the proper formulation of the second question certified for consideration in this case.

Against this background of state law, the control of rents by Respondent constitutes a permanent transfer of economic interests from the park owner to the current tenant. Where the benefit of renting the mobilehome space at a less than fair market rate is coupled with the perpetual occupation of the property by the tenant, there is a physical taking.

The lack of vacancy decontrol exacerbates the effect of the Escondido Ordinance. Because the rent for the mobilehome space is not decontrolled upon a termination of the tenancy, a windfall inevitably accrues to the vacating tenant. The sale price of the coach will reflect the benefit of a rent controlled space. An unregulated sale of the coach will undermine the reason for rent control because the new tenant will pay a higher price for the mobilehome coach and thereby capitalize a portion of the rent.

The actions of the Respondent are therefore well within the holding of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This conclusion is supported by the decisions of the Ninth Circuit in *Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___, 1991 WL 224528 (9th Cir. 1991) and *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988) and the decision of the Third Circuit in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990).

The rejection of the *Hall* and *Barnegat* analysis by the California Court of Appeal in this case was erroneous because the Court made factual assumptions not supported by the evidence. This was particularly inappropriate for a decision on the pleadings. The lower court also erred in concluding that subsequent decisions of this Court had undermined the rationale of *Loretto*, heavily relied upon by both *Hall* and *Barnegat*. A careful reading of the subsequent

decisions discloses, however, that this Court had not repudiated *Loretto*. It has simply refused to extend the *Loretto* holding to non-physical takings.

As a second ground for decision in this case, *Amici* contend that the Escondido Ordinance does not "substantially advance legitimate state interests" and it "denies an owner economically viable use of his land." *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

The principal justifications for rent control are to protect mobilehome owners from unreasonable space rental increases and to protect the owner's investment in the mobilehome coach. Although the protection of consumer welfare if a legitimate end, the means used in this case do not "substantially advance" the governmental interest. Regulation of rents without regulation of the resale of mobilehome coaches allows the current tenant to reap the economic benefit of future rent control. In fact, the means used by Respondent are counterproductive to its own asserted end.

The Ordinance is underinclusive because it does not regulate the resale of mobilehome coaches in order to protect consumers from "unreasonable" increases in the cost of mobilehome housing. Protection of the tenant's investment in the mobilehome coach cannot justify the lack of vacancy decontrol because it gives the seller more than just protection for investment. It gives the seller a windfall. If the justification is articulated as protecting tenants in mobilehome parks with limited incomes, the failure to decontrol the rent when such tenants terminate their tenancy indicates that the Ordinance is overinclusive as well. The means used by the Ordinance therefore do not "substantially advance" the interest asserted by Respondent.

ARGUMENT

I. The Escondido Ordinance Constitutes a Permanent Physical Taking of Petitioners' Property.

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." This provision is applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). The purpose of this guarantee is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n. 4 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Although this Court has acknowledged that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty" (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978)), several factors have been identified. These include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *Id.* at 124.

When the character of the action involves a physical intrusion by government, this Court has stated that a "taking" may be more readily found. *Id.* Indeed, if the intrusion amounts to a permanent physical occupation of property, the "cases uniformly have found a taking to the extent of the occupation, without regard to whether the

action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). Thus, a permanent physical intrusion by the government is not simply one factor in resolving whether the action constitutes a taking, it is determinative. *Id.* at 426.

A. The Escondido Ordinance Combines With the State Mobilehome Residency Law to Permanently Transfer an Interest in Property from the Owner to a Person Occupying the Property in Perpetuity.

The first question therefore is whether operation of the Escondido Ordinance amounts to a permanent physical occupation of the Petitioners' property. It must be conceded at the outset that the Ordinance does not, in and of itself, authorize a physical taking. However, when viewed in connection with state law regarding mobilehome tenancies, its effect is to authorize the taking of economic benefits from the owner by a tenant who is entitled to occupy the property in perpetuity.

The California Mobilehome Residency Law severely limits the grounds upon which a landlord may terminate or refuse to renew a lease. Calif. Civ. Code § 798.55. The park owner may terminate a tenancy only in the event of (1) failure to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after receiving a notice of noncompliance from the appropriate governmental agency; (2) conduct by the mobilehomeowner or resident, upon the park premises, which constitutes a substantial annoyance to other mobilehomeowners or residents; (3) conviction of the homeowner or resident for prostitution or a felony controlled substance offense on account of an act within the

mobilehome park, except that the tenancy may not be terminated if the person convicted permanently vacates and does not subsequently reoccupy the mobilehome; (4) failure of the homeowner or resident to comply with a reasonable rule or regulation which is part of the rental agreement; (5) nonpayment of rent, utility charges, or reasonable service charges, except that a tenant may cure nonpayment within three days after receiving written notice; (6) condemnation of the park; or (7) change in the use of the park. Calif. Civ. Code § 798.56. The practical effect of these limitations is to make the mobilehome tenancy perpetual so long as the rent is paid and the tenant behaves.[3]

When the tenant decides to sell the mobilehome coach, the park owner may not require the removal of the coach from the park except under very limited circumstances. Calif. Civ. Code § 798.73. The park owner may require prior approval of the purchaser, but such approval cannot be withheld if the prospective tenant has the financial ability to pay the rent and charges of the park, unless there is reason to believe, on the basis of the purchaser's prior tenancies, that

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3 *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

Because the Superior Court below determined that Petitioners' complaints failed to state a cause of action as a matter of law, the complaints must be viewed in the light most favorable to the Petitioners and their allegations are to be taken as true. 5A C. Wright & A. Miller, Federal Practice & Procedure § 1357, at 304 (2d Ed. 1990). As this Court has stated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

> In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

"he or she will not comply with the rules and regulations of the park." Calif. Civ. Code § 798.74(a). The practical effect of these provisions is to allow the present tenant to transfer the possessory interest in the mobilehome space to a third party without renegotiation of the terms and conditions of the lease.

With these provisions of state law serving as the legal landscape against which the Escondido Ordinance operates, the control of rents constitutes a permanent transfer of economic interests from the park owner to the current tenant. This occurs in two ways. The first is the benefit of renting property at a rate less than the fair market rental rate. A general power to convey this benefit to tenants is within the recognized police power "to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). But where this benefit is coupled with the perpetual occupation of the property by the tenant, it amounts to a physical taking. The *Loretto* Court was careful to distinguish its holding from the general rent control cases:

> In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. . . . So long as [the rent control regulations] do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.

Loretto, 458 U.S. at 440. The Escondido Ordinance acts in concert with the state mobilehome residency law to achieve precisely this prohibited result.

The second transfer of property resulting from Escondido Ordinance is the ability of the current tenant to realize the future value of the less than fair market rental rates when such tenant vacates the leased premises. Although not inherent in rent control generally, this second benefit is the inevitable result of the Escondido Ordinance. Because the rent is not decontrolled[4] upon the vacation of the premises on account of a sale of the mobilehome coach, a windfall will accrue to the first tenant. The sale price of the coach will inevitably reflect an amount capitalizing the difference between future fair market rent and future controlled rent.[5] To regulate rents in mobilehome parks, but not the resale of mobilehome coaches, inevitably allows the current tenant to reap the economic benefit of future rent control. The consequence of allowing the current tenant to realize the benefit of reduced future rents is that the chief reason for rent control (less than fair market rental rates) is thereafter lost to subsequent tenants because they will have to pay the difference in the form of a higher sales price for the mobilehome coach.

The Escondido Ordinance, when operating against the background of the state mobilehome residency law, therefore constitutes a taking because there is a permanent transfer of interests in property from the owner to another party who is entitled to occupy the property in perpetuity.

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4 There is no provision in the Escondido Ordinance for an adjustment of rent on account of the termination of a mobilehome tenancy and vacation of the leased premises. *See* Escondido Municipal Code, Article V, § 29-103(g). (Respondent's Brief in Opposition to Certiorari, Appendix A-1 - A-3).

5 *See, e.g.*, Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 425, 430-32, 447-48 (1988).

The Ordinance is well within the prohibition articulated by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). If there is a permanent physical occupation of property, authorized by the government, then there has been a taking. *Id.* at 441. The fact that the occupant is a third party and not the government is of no significance. *Id.* at 432 n. 9. The inability of the landlord, however, to terminate, refuse to renew, or reject a new tenant, when combined with the lack of vacancy decontrol, are very significant. This underscores the fact that the physical intrusion in this case is not temporary, but effectively permanent.

The right to choose who might occupy the property has been transferred to the current tenant. As underscored by this Court in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), the right to exclude others is "one of the most essential sticks in the bundle of right that are commonly characterized as property." This is a fundamental attribute of ownership of property, long recognized in the common law. *See, e.g., Eaton v. B.C. & M.R.R.*, 51 N.H. 504 (1872). Recognition of a taking in this case would be well within established precedent based upon a clear textual commitment in the Fifth Amendment.

B. The Circuit Courts of Appeal Have Found a Taking Under the Same Circumstances as Exist in This Case.

The only two Circuits to address this precise issue have both held that rent control without provision for adjustment when a vacancy occurs constitutes a permanent physical occupation by the tenant. *See Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___, 1991 WL 224528 at 4 (9th Cir. 1991); *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347, 353 (3d Cir. 1990); *Hall v.*

City of Santa Barbara, 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

The leading case is *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). In *Hall*, the Ninth Circuit held that the plaintiff had stated a cause of action for an uncompensated taking on the basis of the combined operation of a local mobilehome rent control ordinance and the California Mobilehome Residency law:

> Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a faction of what it is worth in rent; and that this interest is transferable, has an established market and market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto*.

Id. at 1276. The *Hall* Court observed that the effect of the law is to give tenants a lease for an indefinite period. The right to occupy property in perpetuity is a right normally ownership with ownership. It is also the type of property interest protected by the Takings Clause. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967). Not only is the right to occupy indefinitely transferred, but so is the right to decide who will live on the property in the future. *Hall*, 833 F.2d at 1276.

Hall also recognized the second type of taking discussed above. The absence of vacancy decontrol allows the current tenant to realize the profit from future control of rent. This

type of taking is even more extreme because it is divorced from any valid purpose that rent control could possibly serve. The *Hall* Court concluded:

> [B]ecause of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he sells his mobile home. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others.

Id. at 1276-77. The Court rejected the argument that the transfer was not permanent because the ordinance might someday be repealed. "A government taking can always be undone if the government so chooses. That has never defeated a taking claim." *Id.* at 1277. It also discounted the fact that a tenancy could be terminated for cause. The tenant's continuing right to possession is essentially at the will of the tenant, not the landlord. *Id.*

Hall's recognition, at the pleading stage, of a cause of action for a compensable taking was supported by the subsequent factual findings of the United States District Court in *Azul Pacifico, Inc. v. City of Los Angeles*, 740 F.Supp. 772 (C.D. Cal. 1990). In *Azul Pacifico*, the District Court found that mobilehome park owners effectively cannot evict tenants, and they cannot charge market rent. *Id.* at 775-76. It should be noted that the Los Angeles ordinance was not as violative of the property owner's rights because it at least allowed for a maximum

increase of ten percent upon the termination of a tenancy. This still was not enough to avoid a taking. *Id.* at 776. The District Court also found that the vacancy controls operated to transfer a property right from the park owner to the tenants. There was expert testimony which established that coaches in rent-controlled parks sold for considerably more than in parks where market rents prevailed, even after accounting for other variables such as location and amenities. The plaintiff's expert calculated the premium at $20,880; the city's expert calculated it at $5,000. *Id.*

On appeal, these findings were affirmed by the Ninth Circuit. *Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___, ___, 1991 WL 224528 at 5 (9th Cir. 1991). "The premium itself, the existence of which the district court found as a matter of fact, establishes that selling tenants can monetize the property right assigned to them by the [rent stabilization ordinance]." *Id.*

Similarly, the Third Circuit in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990) held that the combined impact of the state law and the local ordinance permanently deprived the owners of a possessory interest in their property. *Id.* at 353. The Third Circuit found the physical invasion of the mobilehome properties and the uncompensated creation of interests in them to be more pronounced than that in *Loretto*. Id. The Court emphasized that the payment to the vacating tenant was in part a payment of future rent:

> [T]he purchaser of a mobile home who pays a premium for the right to keep the home in a mobile home park pays for the cost of the tenancy rather than for the mobile home. Thus, the premium is nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays during his tenancy or in advance. But this rent is paid not to the appellants who own the parks but to the prior tenant who, by virtue of the Barnegat Ordinance and state law has been granted a valuable alienable possessory interest in the park.

Id. In comparing the case with other rent control cases, the Court noted the uniqueness of the mobilehome legislation which has brought about the taking. With rent control of apartment dwellings, the landlord selects and rents to the new tenants.[6] The vacating tenant is not empowered to sell the right to occupy the premises. Furthermore, the tenant cannot occupy the premises in perpetuity. The tenant does not acquire an inheritable right. *Id.* at 355. The Third Circuit reversed the District Court's dismissal of the action and remanded the case for further proceedings on the merits of the plaintiffs' claim.

C. The Rejection of the *Hall* and *Barnegat* Analysis by the Court of Appeal in this Case Was Erroneous as a Matter of Law.

The Court of Appeal in this case rejected the Petitioners' contention that the combined effect of the state and local laws constituted a taking of property. Remarkably, in light of the procedural posture of the case, the Court opposed Petitioners' theory of taking with its own counter theory. It stated that "[w]here a governmental regulation purports to reduce the excessive and unfair price to a reasonable level, the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise

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6 Within the term of the lease, however, the tenant may be able to capture the premium afforded by rent control through the mechanism of a sublease, if permitted under applicable law.

reasonable price regulation into a compensable 'taking.'" Yee v. City of Escondido, 224 Cal.App.3d 1349, 1353, 274 Cal.Rptr. 551, 553 (1990). While the Court's explanation may be interesting, and even enlightening, it is clearly a discussion of the merits and a rejection of Petitioners' theory without giving them a chance to prove their theory through evidence.

The Court of Appeal appears to have assumed that the rent controlled rate is actually closer to fair market rental value than is uncontrolled rent. Id. This is clearly a factual matter to be determined by evidence, not assertion. Nevertheless, the Court of Appeal further criticized Hall with this statement: "Hall and commentators of a like view assume that the uncontrolled rent for a mobilehome space is its 'fair' rental value. (See Hall, 833 F.2d at 1276 (Tenants pay 'only a fraction of what it is worth in rent. . . .')." 224 Cal.App.3d at 1357 n.9, 274 Cal.Rptr. at 556 n. 9. The Court clearly lost sight of the procedural posture of both this case and the Hall case. The Hall Court was bound, as was the Court of Appeal, to assume that the factual allegations of the plaintiffs' complaint were true.

As noted by the dissent, Petitioners alleged a taking through the combined application of state and local law. (Id. at 1359, 274 Cal. Rptr. at 558 (Huffman, J., dissenting). This ordinarily raises a factual issue with respect to the operation of the law, not the facial validity. As such, the California Court of Appeal's attempt to resolve a factual matter without the benefit of evidence is erroneous as a matter of law.

The Court of Appeal also criticized Hall and Barnegat because of their reliance on Loretto, which it argued was substantially eroded by this Court's subsequent decision in F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987).

This contention is easily dispelled by a careful reading of this case. In F.C.C. v. Florida Power Corp., utility companies challenged an Act of Congress which authorized the Federal Communication Commission to regulate the rates, terms and conditions for the attachment of cable television systems to existing utility company poles. Relying on Loretto, the companies claimed that this was a physical taking of their property. The Eleventh Circuit agreed, but this Court reversed.

Unlike Loretto, the utility companies were not required to grant cable companies space on the poles. There was no authorized physical occupation of the challengers' property. 480 U.S. at 251. This Court emphasized: "This element of required acquiescence is at the heart of the concept of occupation." Id. at 252. Moreover, this Court specifically noted: "We do not decide today what the application of [Loretto] would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." Id. at 251-52, n. 6 (emphasis added). This, of course, is precisely the issue that is before this Court now. The mobilehome park owner is required under state law to refrain from terminating tenancies (except for cause), to renew leases which have a specified term (Calif. Civ. Code §§ 798.55 & 798.56), and to enter to agreements with new tenants upon the sale of a mobilehome coach by an existing tenant (Calif. Civ. Code § 798.74(a)). Florida Power, therefore, did not undermine Loretto; it specifically reserved decision on the question of Loretto's application to the facts of this case.

Nor it cannot be argued, as has Respondent[7], that Pennell v. City of San Jose, 485 U.S. 1 (1988) undermines the rationale of Loretto. In Pennell, apartment owners

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[7] See Respondent's Brief in Opposition to Certiorari, pp. 14-15.

challenged a rent control ordinance which allowed for an automatic annual increase in rent by as much as 8 percent, with an administrative review for landlord requests for greater increases. In connection with the administrative hearing for the increase, the hearing officer had to take into account "the hardship to a tenant." 485 U.S. at 5. The challengers asserted that this provision accomplished "a transfer of the landlord's property to individual hardship tenants." Id. at 9. Because the hardship provision had never been relied upon by the hearing officer, this Court held that the case did not "present a sufficiently concrete factual setting for the adjudication of the takings claim . . . ." Id. at 10. With respect to the physical takings issue, this Court specifically declined "to address this contention not only because it was raised for the first time in this Court, but also because it, too, is premised on a hearing officer's actually granting a lower rent to a hardship tenant." Id. at 11 n. 5. It is clear that, like Florida Power, there is nothing in this decision which in any way undermines the rationale of Loretto.[8]

Application of the Loretto analysis to this case, as was done by the Ninth Circuit and the Third Circuit, means that the Escondido Ordinance is to be subjected to the per se rule for physical takings. In such instance, the question then becomes how much compensation is due. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 441.

There is nothing in the record which would indicate that Petitioners have receive anything for "the taking of the

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[8] Likewise, United States v. Sperry, 493 U.S. 52 (1989) cannot be relied upon as evidence for the proposition that the rationale of either Loretto or Hall has been undermined. Sperry's holding that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services" (Id. at 63) is unexceptional.

alienable physical property interest vested in their tenants." Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347, 353 (3d Cir. 1990). Because the state court never reached this issue, it is appropriate to remand this case to the state court for further proceedings on this issue.

11. The Escondido Ordinance Does Not "Substantially Advance Legitimate State Interests" and It "Denies an Owner Economically Viable Use of His Land."

In the event that the Escondido Ordinance does not constitute a physical taking, then it must meet the standard for land use regulations generally. A "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).[9]

The justification underlying the Ordinance, as stated by the Respondent, is:

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[9] Amici again state that this formulation of the question is based on their understanding of this Court's certification of Petitioners' second issue. ___ U.S. ___, 112 S.Ct. 294 (1991). Nollan v. California Coastal Commission, 483 U.S. 825 (1987) is a regulatory taking case which articulates a higher standard than the rational basis test. Id. at 834. This approach has been characterized or viewed by commentators as an example of "substantive due process." See, e.g., Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1, 38, 44; Karlen, Back to the Future: From Nollan to Lochner, 17 Southwestern L. Rev. 627, 630-31 (1988); Recent Developments, Making Room at the Inn: Rent Control as a Regulatory Taking, 38 Wash. U. J. of Urb. and Contemp. Law 305, 329-300 (1990).

> The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases, therefore protecting the homeowner's investments, while also providing park owners with a just and reasonable return on the park owner's investment.

(Respondent's Brief in Opposition to Certiorari, p. 27). It must be conceded that the protection of consumer welfare is a legitimate purpose of local government. See Pennell v. City of San Jose, 485 U.S. 1, 13 (1988). The real question is whether the means used by local government in this case "substantially advance" this legitimate interest.

As a general proposition, this Court has held that rent controls are sufficiently related to this end to survive a due process scrutiny. Pennell v. City of San Jose, 485 U.S. 1, 13-14 (1988). Pennell's holding, however, is not dispositive with respect to the Escondido Ordinance. The absence of vacancy decontrol, when combined with the state mobilehome residency guarantee of a perpetual tenancy and a right to transfer such tenancy, is not closely related to the asserted goal of "protecting mobilehome owners from unreasonable space rental increases." In fact, it merely changes the identity of the party who may reap the benefit of any future rise in the market for mobilehome spaces.

Regulation of rents without regulation of the resale of mobilehome coaches allows the current tenant to reap the economic benefit of future rent control. The original reason for rent control, protecting mobilehome owners from "unreasonable" increases in the cost of mobilehome housing, thus disappears. If the reason for the lack of vacancy decontrol is the protection of future mobilehome owners this is contradicted by the apparent unwillingness to regulate the

sale of the coach,[10] which is actually easier to control because there are industry guides on resale values available.[11] If it is argued that rent control must be carried over to the new purchaser in order to allow the seller to be able to protect the investment in the mobilehome coach, the failure to regulate the resale of the coach allows more than the protection of investment. It creates a windfall for the seller at the expense of the park owner. In this sense, the Ordinance is underinclusive. See, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 n. 19 (1985); Mississippi University for Women v. Hogan, 458 U.S. 718, 730-31 (1982).

If the justification is articulated as protecting tenants in mobilehome parks with limited incomes, the failure to decontrol the rent when such tenants terminate their tenancy indicates that the Ordinance is overinclusive as well. The Ordinance may also be overinclusive because of its apparent assumption that all mobilehome parks operate in a monopolistic market context.[12] See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977).

A close examination of the Escondido Ordinance, as required by the higher standard for regulation of property interests articulated in Nollan, 483 U.S. at 834, shows that the "fit" between the admittedly legitimate purpose and the means used by the Respondent in this case is not a close one. The interest asserted is therefore not "substantially

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10 This irony was noted by the Third Circuit in Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347, 353 n.9 (3d Cir. 1990).

11 See, e.g., the current edition of the Kelley Blue Book, Manufactured Housing and Mobile Home Guide.

12 See Respondent's Brief in Opposition to Certiorari, p. 28.

advanced" by the means used. See also Seawall Associates v. City of New York, 74 N.Y.2d 92, 111-12, 542 N.E.2d 1059, 1068-69 (1989), cert. denied, 493 U.S. 976 (1989). There are less restrictive alternatives available other than the blunt instrument of a regulatory taking. Respondent (or the state) might choose to provide housing subsidies for low and fixed income tenants or perhaps it might offer a reduction or elimination of the park owner's property taxes if there is a voluntary cap placed on rents.

The Ordinance also denies the owner the economically viable use of the property because the property interest has been transferred to the current tenant. The landlord is compensated, of course, for the use of the mobilehome space during the rental period (although the Petitioners contend that this compensation is at a less than fair market rate). But there is no compensation provided the transfer of the right to reap the benefit of any future rise in the market for mobilehome spaces, nor is there compensation for loss of the right to choose the next tenant.

Because the Escondido Ordinance is not substantially related to a legitimate governmental interest and because it deprives the owner of property of the economic use of same, the Ordinance fails to meet the Nollan standard. This Court should therefore reverse and remand on this ground as well.

CONCLUSION

The Escondido Ordinance, though possibly well-intentioned, deprives the park owner of valuable property rights without achieving any long-term advantage for tenants. The Ordinance confers a one time benefit to a selected group of tenants. That is a taking. What is needed is a more appropriate balance between the desire to protect consumer welfare while at the same time protecting the

constitutional property rights of park owners. Escondido has attempted to acquire low income mobilehome housing for its community without taking the responsibility of paying for it. It is yet another form of "off-budget spending." This is especially pernicious because it removes an important question of social policy from the normal restraints of the political process.

This case presents an important opportunity for this Court to demonstrate the vitality of the Constitution's express guarantee that private property shall not "be taken for public use, without just compensation." The factual circumstances alleged by Petitioners show that there has been a permanent physical occupation of property by parties acting under the authority of state and local law. The Respondent's own justification of the Ordinance demonstrates the "public use" to which the Petitioners' property is burdened. What is required therefore is a reversal of the decision of the lower court and a remand so that the amount of just compensation can be determined.

Respectfully submitted,

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